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No. 92-1014

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1992

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**SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS, PETITIONER,**

**v.**

**COALITION FOR CLEAN AIR, INC., *et al.*, RESPONDENTS**

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**On Petition For A Writ Of Certiorari To the United States Court Of Appeals For The Ninth Circuit**

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# BRIEF IN OPPOSITION OF RESPONDENTS COALITION FOR CLEAN AIR AND SIERRA CLUB

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## QUESTIONS PRESENTED

1. Does Section 110(c) of the Clean Air Act, as amended in 1990, 42 U.S.C. § 7410(c), require the Environmental Protection Agency ("EPA") to promulgate Federal Implementation Plans ("FIPs") for ozone and carbon monoxide for the South Coast Air Basin based upon EPA's disapproval in January 1988 of the State Implementation Plan submitted for the South Coast?

2. Should EPA's representations to Congress prior to enactment of the 1990 Clean Air Act Amendments, that the language ultimately adopted in Section 110(c) would mandate completion of the South Coast FIPs, be considered persuasive in interpreting the intent of Congress?

3. Independently of the requirements of Section 110(c), does Section 193 of the 1990 Amendments, 42 U.S.C. § 7515, preserve a settlement agreement and order thereon that, as of the date of the Amendments, required EPA to finalize the South Coast FIPs and associated control requirements by February 28, 1991?

## TABLE OF AUTHORITIES

### STATUTES AND REGULATIONS

Clean Air Act, 42 U.S.C. § 7401 *et seq.*:

§ 110(c), 42 U.S.C. § 7410(c) (Supp. II 1990) . . . . . 6
§ 302(y), 42 U.S.C. § 7602(y) (Supp. II 1990) . . . . . 4

Sup. Ct. R. 12.4 . . . . . 2
Sup. Ct. R. 29.1 . . . . . 1

### MISCELLANEOUS

55 Fed. Reg. (1990)

p. 36,458 . . . . . 4
p. 37,501 . . . . . 5

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The Coalition for Clean Air and Sierra Club (jointly, the "Coalition")[1] oppose the Southern California Association of Governments' ("SCAG") Petition for Writ of Certiorari ("Petition") and urge that the Petition be denied. As set forth in more detail in the Coalition's December 9, 1992, Brief in Opposition ("Coalition Brief") to the Environmental Protection Agency's ("EPA's") parallel petition for writ of certiorari ("EPA

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[1]Respondents Coalition for Clean Air and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Sup. Ct. R. 29.1.

Petition") in No. 92-798, the Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans ("FIPs") for California's South Coast Air Basin, a holding applicable to a very limited set of specific situations that will not recur.

Since the SCAG Petition largely repeats and incorporates the EPA Petition, in response the Coalition incorporates and relies upon the December 9, 1992, Coalition Brief in its entirety.

The reason for SCAG's separate petition is unclear. SCAG was a party to the same appeals addressed by the EPA Petition in No. 92-798, and by virtue of Supreme Court Rule 12.4 SCAG is deemed to be a party to the proceedings before this Court as initiated by the EPA Petition. However, SCAG elected not to file a brief in support of the EPA Petition within the twenty day period provided under Supreme Court Rule 12.4, a period that cannot be extended. Instead, SCAG has styled as a separate petition what amounts to a brief in support of the EPA Petition -- as such it is not timely filed.[2]

The nature of SCAG's pleading is apparent from the fact

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[2]As with the brief filed by the Los Angeles Area Chamber of Commerce ("Chamber"), the practical effect of this approach was to prevent the Coalition from addressing in the original brief in opposition the points made by SCAG. It also potentially reopens a thirty day period for filing this opposition. In order to move this matter forward promptly, the Coalition has filed this brief in opposition well in advance of that new deadline, and respectfully requests that the matter be set for conference so that further delays in the FIP can be minimized.

Although this situation appears somewhat unusual since EPA filed its Petition approximately five weeks before it was due, so the twenty day period ran before the original deadline to petition for certiorari, there seems to be no reason to allow SCAG to avoid that twenty day limit simply by characterizing its supporting brief as a separate petition.

that SCAG's statement of the "questions presented" is virtually identical to EPA's and SCAG relies throughout its Petition on reference to EPA's Petition to provide essential elements of its own Petition.

The reasons stated by SCAG for granting the petition also closely parallel the arguments made by EPA. For that reason, the Coalition relies principally on its earlier Coalition Brief to respond to most of the arguments in SCAG's Petition. Only key points and points not previously raised by EPA are addressed below.

SCAG first describes the extensive state plan prepared by SCAG and the South Coast Air Quality Management District ("SCAQMD") and submitted to EPA in 1989, and expresses the concern that EPA's FIP will be prepared without considering this state plan. SCAG Petition at 5. But there is nothing in the 1990 Amendments or the Ninth Circuit's opinion that prevents EPA from dovetailing its plan with the already-submitted state plan. Indeed, a coordinated state/federal process is expressly allowed under the new definition of FIPs, added by the 1990 Amendments:

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emissions limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

42 U.S.C. § 7602(y) (Supp. II 1990). This is exactly what EPA

recommended in the proposed FIP rulemaking published September 5, 1990. 55 Fed. Reg. 36,458 (1990).

Significantly, SCAG recognizes that, "[m]ost of the work on the matters which are necessary in order to develop a realistic attainment plan has been completed or is in the process of being completed." SCAG Petition at 6. This concession discloses as mere rhetoric the claim that completion of the FIP at this time will prevent the state from taking the initiative to develop plan requirements. SCAG and SCAQMD have been working on this plan now for over twenty years, and a complete plan was submitted in 1989, as SCAG recognizes. The state has therefore had the opportunity to serve as the "primary source of the plan . . . ." *Id.* The fact remains, however, that the plan cannot show attainment of the ambient air quality standards by the statutory deadline without federal measures, as discussed at length in SCAQMD's brief in opposition to the EPA Petition.

Curiously, SCAG argues that EPA should have a secondary "backstop" role that is limited to filling gaps in the state plan, but this is exactly what EPA did in the September 1990 proposed FIP -- an approach that now is expressly permitted by the new FIP definition quoted above. No party, including the Coalition, has ever argued to the contrary -- i.e., that the FIP will need to be complete in and of itself. The Ninth Circuit, for its part, properly applied this principle by recognizing that, "a FIP, as defined by the 1990 Amendments, is specifically designed to supplement rather than to replace state planning . . . ." EPA Petition at 16a n. 10. The Ninth Circuit also confirmed that, "there appears to be nothing to stop EPA from allowing California to rely on anticipated technology by approving SIP provisions that now meet the requirements of the Act." EPA Petition at 15a. The harms forecasted by SCAG are unsupported; in any event those harms are not implicated by the

language of the Ninth Circuit's decision.

SCAG's speculation that EPA's FIP will not be tailored to local circumstances (SCAG Petition at 6-7) fails to cite any real basis for this concern or to point to any particular limitation on EPA's ability to adapt the FIP to local circumstances. In fact, no such limitation exists. EPA can regulate industrial areas differently than residential areas, for example, just as can SCAG and SCAQMD.[3]

The concern that SCAG will be frozen out of the FIP process (SCAG Petition at 8 - 9) likewise is unsupported. The Coalition for its part is fully supportive of a reasonable period for FIP development that allows receipt of public input (at minimum) through public comment following publication of a revised FIP proposal. The FIP can take into account the concerns expressed by SCAG and others and can also take advantage of the new flexibility in the 1990 Amendments. The specific concern that SCAG demographic analyses and population forecasts will not be addressed is belied by the September 1990 proposed FIP which in fact relied on those projections. 55 Fed. Reg. at 36,501 ("EPA's proposed FIP for ozone and CO is largely based on the State's recent draft baseyear inventory for calendar year 1987 and the State's projected inventories for 2000 and 2010 contained in the 1989 AQMP").

The fact that neither SCAG, EPA nor the Chamber can identify specific reasons why the FIP will be irrationally burdensome, and instead must rely on general claims of hardship or dire forecasts of gas rationing and similarly preposterous

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[3]Similarly, SCAG's forecast that EPA's 1976 gas rationing fiasco will be repeated is not borne out by EPA's September, 1990, proposed FIP nor by any other authority.

proposals, discloses the underlying flaw in their analysis and the correctness of the Ninth Circuit's decision. As the Ninth Circuit held, there is no anomaly in having the FIPs proceed now, and the plain language of Section 110(c) continuing EPA's FIP duties should be enforced despite the long standing objections of some parties who might be affected. Those objections were presented to Congress but rejected; Congress' determination is dispositive.

As with the Chamber's amicus brief, the nature of SCAG's arguments illustrates that this is fundamentally a political matter that was resolved by Congress in the 1990 Amendments through the compromise language selected in Section 110(c) and in the FIP definition quoted above. As EPA Administrator Reilly recognized, however, this compromise language continued the agency's obligation to complete the FIPs for the South Coast.

Respectfully submitted,

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